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FOLIN & BROTHERS SDN BHD & ORS

v.

FOLIN FOOD PROCESSING SDN BHD & ORS

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COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02(NCC)-210-2011]

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27 JULY 2011

CIVIL PROCEDURE: *Settlement - Consent order - Agreement by parties to resolve issues by obtaining expert opinion - Whether expert decision binding on parties if expert materially departs from terms of*

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instruction - Whether expert's decision can be challenged for fraud, collusion, partiality, lack of independence

COMPANY LAW: *Liquidation - Liquidator, rights of - Rights of liquidators to obtain information and documents relating to valuation of company's assets*

E

COMPANY LAW: *Winding up - Disposition of property - Whether valuation properly carried out - Whether company assets undervalued - Valuation not independent and not reflecting fair value of property*

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Folin Food Processing Sdn Bhd (Folin Food) had a paid up capital of 1,000,005 shares of which 1,000,000 shares were held by the 1st appellant (Folin Brothers). The remaining five shares were held one share each by the 2nd and 3rd appellants (the liquidators of Folin Brothers) and the 3rd, 4th and 5th

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respondents. The 3rd, 4th and 5th respondents together owned 75% of the shares in Folin Brothers (in liquidation). The board of directors of Folin Food was made up of three members, namely the two liquidators and the 3rd respondent. A dispute arose between the 3rd, 4th and 5th respondents, on the one hand, and

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the liquidators, on the other hand, as to the management of the affairs of Folin Food resulting in the 3rd, 4th, and 5th respondents launching a s. 181 Petition alleging oppression as minority shareholders of Folin Food (181 Petition). In the meantime an offer was made by the 3rd, 4th and 5th respondents

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to purchase the shares held by Folin Brothers in Folin Food for a price of RM7,136,680. The liquidators of Folin Brothers did not agree to the offer. The parties to the 181 petition later entered

into a consent order which provided that Ernst & Young was to be appointed to value the shares of the 1st respondent. Upon ascertainment of a fair price of the shares of the 1st respondent, a sale and purchase agreement was to be entered into between the relevant parties. The only asset for valuation in Folin Food was a property known as Lot No. 316, Section 14, Petaling Jaya and that a substantial portion of the valuation of its shares relied on the valuation of the said property ('the Property'). The 3rd respondent, without obtaining the approval of the board of directors of Folin Food, appointed First Pacific Valuers Property Consultants Sdn Bhd ('First Pacific') to conduct the valuation of the Property. Ernst & Young then prepared their report based on the valuation done by First Pacific and submitted a draft to the 3rd respondent who accepted the report. Ernst & Young then issued their report to all the parties purporting to value the shares of Folin Food at RM2.9 million. The liquidators immediately wrote to Ernst & Young objecting to the fact that they were never consulted and that the audited accounts relied on by Ernst & Young were disputed. The liquidators commenced the present action seeking to set-aside the report alleging that Ernst & Young had been negligent in preparing the report and sought damages against them. The 3rd, 4th and 5th respondents counterclaimed seeking specific performance of the sale and purchase agreement as stipulated in the consent order. The learned High Court Judge dismissed the liquidators' claim against all the respondents and allowed the 3rd, 4th and 5th respondents' counterclaim. Hence this appeal. The appellants submitted that valuation of the property done by First Pacific of RM5.9 million did not reflect the fair value of the property.

Held (allowing the appeal in part with costs)
Per Ramly Ali JCA:

(1) The process of appointing First Pacific as the property valuer was not done in a fair manner as envisaged by the consent order. It was solely done by the 3rd respondent without any consultation, consent or authority from the board of directors of Folin Food. Therefore the valuation report prepared by First Pacific could not be relied upon by Ernst & Young for the purpose of shares valuation of Folin Food. (paras 101 & 102)

(2) The 3rd, 4th and 5th respondents were clearly interested parties to the valuation process. They were the "purchasers-to-be" of Folin Food shares held by Folin Brothers (in

liquidation) and the appellants. Thus, to allow the 3rd respondent to solely appoint First Pacific to value the Property and to pay the valuer's fees from his own source (not from Folin Food) was clearly unwarranted. (para 103)

(3) The valuation done by First Pacific of RM5.9 million did not reflect the fair value of the Property. Since the valuation by First Pacific was not independent and did not reflect the fair value of the property, it followed that the Ernst & Young valuation of the shares of Folin Food consequently failed to reflect a fair value of the shares. (paras 104 & 105)

(4) First Pacific, as valuer of the property, valued the property at RM5.9 million, while Ernst & Young, as valuer of the shares valued the shares at RM2.9 million. The difference in both valuations is very significant. There was no logical explanation given in the report or evidence adduced in court to explain the difference. (para 108)

(5) The facts pleaded by the appellants against Ernst & Young did not establish negligence. There may be weaknesses on the part of Ernst & Young in relying on the valuation of the property by First Pacific and an audited management report to the accounts of Folin Food for the financial year ended 31 December 2008 without taking into account the fact that the audited management report was challenged, but such weaknesses alone were insufficient to constitute actionable negligence. (paras 115 & 116)

Per Zainun Ali JCA:

(1) Considering that the appellants as liquidators have the power to bring or defend any action or other legal proceedings and have generally wide powers under the Act, it was untenable for Ernst & Young to have taken an uncompromising stand in refusing them the information and documents they sought, particularly relating to the valuation by First Pacific Valuers. (paras 18 & 19)

(2) Where a contract or consent order provides for a matter to be decided by an expert, the decision is binding on the parties because that is what they themselves have determined should be the position. However, this is so only if the expert's decision is a decision which has been made in accordance with the terms of the contract or consent order. The decision will

not bind the parties if the expert, in coming to that decision, had departed from the explicit terms of the instruction to a material extent. An expert's decision can be subject to challenge for fraud, collusion, partiality, lack of independence etc. (paras 47 & 48)

Bahasa Malaysia *Translation Of Headnotes*

Folin Food Processing Sdn Bhd ('Folin Food') mempunyai saham berbayar sebanyak 1,000,005 di mana 1,000,000 darinya dipegang oleh perayu pertama ('Folin Brothers'). Bagi lima saham selebihnya, setiap satunya dipegang oleh perayu-perayu kedua dan ketiga ('Pelikuidasi Folin Brothers') dan responden-responden ketiga, keempat dan kelima. Responden-responden ketiga, keempat dan kelima juga memiliki 75% dari saham-saham Folin Brothers (dalam likuidasi). Lembaga Pengarah Folin Food terdiri dari tiga ahli, iaitu dua Pelikuidasi dan responden ketiga. Pertikaian berbangkit di antara responden-responden ketiga, keempat dan kelima, di satu pihak, dan Pelikuidasi-Pelikuidasi di pihak yang lain, berkaitan pengurusan halehwal Folin Food, berakibat responden-responden ketiga, keempat dan kelima memulakan petisyen s. 181 mendakwakan penindasan terhadap mereka sebagai pemegang saham minoriti Folin Food ('Petisyen s. 181'). Sementara itu, satu tawaran telah dibuat oleh responden-responden ketiga, keempat dan kelima untuk membeli saham-saham yang dipegang oleh Folin Brothers di dalam Folin Food untuk harga RM7,136,680. Pelikuidasi Folin Brothers tidak bersetuju dengan tawaran. Pihak-pihak kepada petisyen 181 kemudian memeterai satu perintah persetujuan sambil memperuntukkan bahawa Ernst & Young hendaklah dilantik untuk menilai saham-saham responden pertama. Dan sebaik suatu harga patut saham-saham responden pertama dapat ditentukan, maka suatu perjanjian jual beli akan dimasuki oleh pihak-pihak terbabit. Satu-satunya aset di dalam Folin Food untuk dinilaikan adalah satu hartanah yang dikenali sebagai Lot No. 316, Seksyen 14, Petaling Jaya dan bahawa sebahagian besar dari penilaian saham-sahamnya adalah bergantung kepada penilaian hartanah tersebut ('hartanah'). Responden ketiga, tanpa mendapat pengesahan dari lembaga pengarah Folin Food, telah melantik First Pacific Valuers Property Consultants Sdn Bhd ('First Pacific') bagi menjalankan penilaian hartanah. Ernst & Young selepas itu menyediakan laporan mereka berdasarkan penilaian yang dibuat oleh First Pacific menyerahkan deraf kepada responden ketiga yang menerima laporan tersebut. Ernst & Young kemudian mengeluarkan laporan mereka kepada semua pihak yang menilai saham-saham Folin Food pada harga

A RM2.9 juta. Pelikuidasi dengan serta merta menulis kepada Ernst & Young membantah fakta bahawa mereka langsung tidak dibawa berunding dan bahawa akaun berodit yang dijadikan pergantungan oleh Ernst & Young adalah dipertikaikan. Pelikuidasi memulakan tindakan semasa memohon untuk mengenepikan laporan dengan B mendakwa bahawa Ernst & Young melakukan kecuaian dalam menyediakan laporan sekaligus menuntut ganti rugi dari mereka. Responden-responden ketiga, keempat dan kelima menuntut pelaksanaan spesifik perjanjian jual beli seperti yang dirujuk di dalam Perintah Persetujuan. Yang arif hakim Mahkamah Tinggi C menolak tuntutan Pelikuidasi terhadap kesemua responden-responden dan membenarkan tuntutan balas responden-responden ketiga, keempat dan kelima. Perayu-perayu merayu dan berhujah bahawa penilaian hartanah RM5.9 juta yang dibuat oleh First Pacific tidak mencerminkan nilai yang patut bagi hartanah.

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Diputuskan (membenarkan rayuan sebahagiannya dengan kos)

Oleh Ramly Ali HMR:

E **(1)** Proses perlantikan First Pacific sebagai penilai hartanah tidak dibuat dengan cara yang adil seperti yang dikehendaki oleh Perintah Persetujuan. Ia dibuat hanya oleh responden ketiga tanpa sebarang rundingan, persetujuan atau autoriti dari lembaga pengarah Folin Food. Oleh itu, laporan penilaian yang F disediakan oleh First Pacific tidak boleh dijadikan pergantungan oleh Ernst and Young bagi maksud penilaian saham-saham Folin Food.

(2) Responden-responden ketiga, keempat dan kelima jelas merupakan pihak-pihak yang berkepentingan kepada proses G penilaian. Mereka adalah 'bakal-bakal pembeli' saham-saham Folin Food yang dipegang oleh Folin Brothers (dalam likuidasi) dan perayu-perayu. Oleh itu, membenarkan responden secara bersendirian melantik First Pacific bagi menilai hartanah dan membayar yuran penilai dari sumbernya sendiri (tidak dari Folin H Food) adalah jelas tidak wajar.

(3) Penilaian RM5.9 juta yang dibuat oleh First Pacific tidak mencerminkan nilai patut hartanah. Oleh kerana penilaian oleh First Pacific bukan penilaian yang bebas dan tidak I menampakkan nilai patut hartanah, ianya mengikut bahawa penilaian saham-saham Folin Food oleh Ernst & Young juga gagal mencerminkan nilai patut bagi saham-saham.

(4) First Pacific, sebagai penilai hartanah, telah menilai hartanah pada harga RM5.9 juta, sementara Ernst & Young, sebagai penilai saham-saham menilai saham-saham pada harga RM2.9 juta. Perbezaan antara kedua-dua penilaian adalah sangat signifikan. Namun tiada penjelasan logik diberikan sama ada di dalam laporan mahupun melalui keterangan di mahkamah untuk menjelaskan perbezaan.

(5) Fakta-fakta yang diplidkan oleh perayu-perayu terhadap Ernst & Young tidak menunjukkan kecuaian. Kelemahan mungkin wujud di pihak Ernst & Young dalam bergantung kepada penilaian hartanah yang dibuat oleh First Pacific dan kepada laporan pengurusan berodit bagi akaun Folin Food bagi tahun kewangan yang berakhir 31 Disember 2008 tanpa mengambilkira fakta bahawa laporan pengurusan berodit tersebut telah dipertikai, namun kelemahan sedemikian semata-mata tidak mencukupi untuk membentuk kecuaian yang boleh diambil tindakan.

Oleh Zainun Ali HMR:

(1) Mengambilkira bahawa perayu-perayu sebagai pelikuidasi mempunyai kuasa-kuasa yang luas untuk membawa atau mempertahan sesuatu tindakan atau lain-lain prosiding undang-undang serta mempunyai kuasa yang umumnya luas di bawah Akta, adalah tidak wajar bagi Ernst & Young untuk mengambil satu pendirian yang tidak berkompromi dengan enggan menyerahkan maklumat dan dokumen-dokumen yang dikehendaki oleh mereka, terutama mengenai penilaian yang dibuat oleh First Pacific Valuers.

(2) Di mana suatu kontrak atau Perintah Persetujuan memperuntukkan bagi sesuatu halperkara itu diputuskan oleh seorang pakar, keputusan adalah mengikat atas pihak-pihak kerana itulah kedudukannya yang mereka sendiri kehendaki dan putuskan. Bagaimanapun, kedudukannya adalah sebegitu jika keputusan pakar tersebut adalah suatu keputusan yang dibuat mengikut terma-terma kontrak atau Perintah Persetujuan. Keputusan tidak akan mengikat pihak-pihak jika pakar, dalam mencapai keputusannya itu, telah dengan secara pentingnya menyeleweng dari terma-terma jelas arahan. Sesuatu keputusan pakar boleh dicabar atas alasan-alasan fraud, pakatan, berat sebelah, tidak bebas dan sebagainya.

Case(s) referred to:

Baber v. Kenwood Manufacturing Co Ltd v. Whinney Murray & Co [1978] 1 Lloyds Rep 175 ***(refd)***

Campbell v. Edwards [1976] 1 WLR 403 ***(refd)***

Collier v. Mason [1858] 25 Beav 200 ***(refd)***

Jones v. Sherwood [1992] 1 WLR 277 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 236, 237

For the appellants - Fiona Bodipalar (James Chow, Darren Lai & Natasha Louis with her); M/s Chow Kok Leong & Co

For the 2nd respondent - Lambert Rasa - Ratnam (Sean Yeow & Joyce Lim with him); M/s Lee Hishamuddin Allen & Gledhill

For the 3rd, 4th & 5th respondents - Hj Sulaiman Abdullah (Michael Chow & Derek Chong with him); M/s Michael Chow

[Appeal from High Court, Kuala Lumpur; Suit No: D-22NCC-674-2009]

Reported by Amutha Suppayah

JUDGMENT

Zainun Ali JCA:

[1] I have read the judgment of my learned brother Ramly Ali JCA. Since His Lordship had set out the facts of this appeal comprehensively, I am spared from having to do so, save to briefly state the salient points below.

[2] The joint liquidators are the liquidators of the 1st appellant (Folin Brothers).

[3] Folin Brothers is the majority shareholder holding 1,000,002 shares in the 1st respondent (Folin Food). The Minority Shareholders all hold one share each in Folin Food. Thus the balance two shares in Folin Food are held by Wong Boon Sun who is a bankrupt and the estate of Wong Foh Ling.

[4] A dispute arose between the joint liquidators and the Minority Shareholders, resulting in the Minority Shareholders filing a 181 Petition against the joint liquidators.

[5] The Minority Shareholders offered to purchase the shares held by Folin Brothers in Folin Food for the sum of RM7,136,680. Though the joint liquidators declined the offer, they agreed however, to appoint an independent valuer to ascertain the fair value of the shares of Folin Food to which the Minority Shareholders agreed. They also agreed that the said independent valuer was to be paid from the proceeds of the sale.

[6] On 4 June 2009, the joint liquidators and Folin Food entered into a consent order (the consent order) with the Minority Shareholders.

[7] Even as my learned brother Ramly Ali, JCA had outlined the terms of the said consent order, for the purposes of my view herein, it would be useful to once again list out the pertinent terms of the consent order. They are that:

(a) Ernst & Young was to be appointed as an expert to value the shares of Folin Food with unfettered and unrestricted access to the books of Folin Food.

(b) Upon ascertainment of a fair price of the shares of Folin Food, a sale and purchase agreement was to be entered into between the relevant parties within 30 days.

[8] Soon after the consent order was entered into, DW2 on behalf of Ernst & Young, communicated with the 2nd appellant for the relevant documents and information in relation to Folin Food in furtherance of their assignment under the consent order. However, the 2nd and 3rd appellants were not in possession of the relevant documents and information. It has been documented how DW2 was then directed by no less than the 2nd appellant himself, to get in touch with the 3rd respondents (Wong Sin Fan). Though the respondents made much of this fact to counter the appellant's allegation of bias on Wong Sin Fan's part, nothing turns on this, as would be unfolded later.

[9] It is undisputed that on 8 April 2009, ie, even before the consent order was entered into, Wong Sin Fan had appointed one estate valuer called First Pacific Valuers Property Consultants Sdn. Bhd. ("First Pacific Valuers") to conduct the valuation of the property.

[10] Undisputably too, Wong Sin Fan did not obtain the approval of the Board of Folin Food to appoint First Pacific Valuers.

[11] It is also undisputed that the fees paid to First Pacific Valuer were paid by Wong Sin Fan and not by Folin Food.

[12] More critical is the undisputed fact that the valuation was carried out by First Pacific Valuer as directed by Wong and that Ernst & Young prepared their report based on the valuation made by First Pacific Valuers, and Ernst & Yong then submitted a draft of the same to Wong Sin Fan on 26 August 2009.

[13] It is undisputed too that Wong Sin Fan approved the draft report prepared by Ernst & Young, without first obtaining authority from Folin Food to do so.

[14] Thus when Ernst & Young issued their report (ie, Ernst Young's Report) to all parties on 25 September 2009 purporting to value the shares of Folin Food at RM2.9 million, there was bedlam. The joint liquidators immediately objected, firstly on the ground that they were never consulted in the preparation of the report and secondly that the draft audited accounts relied on by Ernst & Young had been actively disputed by them earlier. What galled the joint liquidators was the fact that their request to Ernst & Young for information and documents including a copy of their engagement letter and the First Pacific Valuers Report, were flatly refused by Ernst & Young.

The Position Of The Liquidators

[15] The respondents seemed oblivious that the said liquidators were appointed by the court on the application of the respondents themselves. The powers of the liquidator are immense. It is his job to take into his custody or control all the property or choses-in-action to which the company is or appears to be entitled.

[16] As Walter Woon in *"Company Law"* had expressed:

> A liquidator has two sorts of powers: those that he may exercise in his own discretion, and those that require the approval of some other body.

[17] Once a company is in liquidation, the board of directors is effectively *functus officio*, since the power to run the company is now in the hands of the liquidator. His job is to wind up the company's business, realize assets, pay off the creditors and return any surplus left over, to the members.

[18] Considering that the appellants as liquidators have the power to bring or defend any action or other legal proceedings and have generally wide powers under the Act, it is untenable for Ernst & Young to have taken an uncompromising stand in refusing them the information and documents they sought, particularly relating to the valuation by First Pacific Valuers.

[19] Shortly after the valuation by Ernst & Young, the minority shareholders sent a Sales and Purchase Agreement ("SPA") to the joint liquidators for the purchase of the shares at the price determined by Ernst & Young.

[20] Unhappy with what is seen as a breach of and departure from the mandate given to Ernst & Young under the consent order resulting in a valuation by Ernst & Young that was not reflective of a fair valuation of the Folin Food shares, the joint liquidators (appellants) then filed an action. The minority shareholders filed a counterclaim for specific performance of the SPA.

[21] Clearly the nub of the matter is:

1) Whether the First Pacific Report, relied substantially by Ernst & Young is independent and reflective of a fair valuation of the shares of Folin Food;

2) If it is not a fair valuation, whether Ernst & Young had acted contrary to the mandate given in the consent order;

3) Whether in the light of the above, it is open to the appellant to challenge the valuation given by an expert. (ie, Ernst & Young).

[22] Firstly the question which arises is this: In considering what is/is not a fair valuation what does one look for? In other words, how does one value a company? A business appraiser might consider a variety of valuation approaches such as the:

(a) Asset approach

(b) Market approach

(c) Discounted cash flow approach

(d) Formula approach

[23] In practice, a combination of approaches is commonly used with differing weights given to each selected approach.

[24] The asset approach relies on a company's adjusted book value by substituting the fair market value of assets and liabilities for the stated value of assets and liabilities. This approach is useful for valuing a company with substantial non-operating assets such as land or natural resources. This approach is generally not used to value a company as a going concern.

[25] The market approach is simple for the quoted company: just take the stock market value of the company at the relevant date and multiply it by the number of shares in issue. However this may be difficult in the case of a private company since it is not quoted on any stock exchange. To use this approach, one must compare the private company to the public companies that are as similar as possible in size, growth, gearing and so on to determine relative risk.

[26] The discounted cash flow approach relies on a multiple year projections based on the management's reasonable estimates of the company's prospects.

[27] The formula approach may take many forms, such as a multiple of book values or multiple of revenues. The disadvantage is that it may not reflect fair market value.

[28] Though valuation of assets or shares is not an exact science to establish a fair market value, hard figures such as assets and liabilities and historical earnings and cash flow are usual; soft figures such as projected earnings, future cash flow, the quality of management and know-how, current market conditions are often used. With all these subjectivity, fair market value can be a range of estimates. However, they must be a **fair estimate**. (My emphasis).

[29] Coming back to the present appeal, it is undisputed that Ernst & Young relied amongst others, on the 2008 accounts and the valuation report prepared by First Pacific Valuers which was commissioned by Wong Sin Fan.

[30] The appellants contended that the valuation based on the above was not a fair valuation. Is this contention correct?

[31] Firstly, it is common ground that the appellants had vigorously disputed the 2008 account. The 3rd to 5th respondent's submission was that if the appellants had already disputed the 2008 account at the time the consent order was drawn up, why did the appellant not alerted Ernst & Young regarding the dispute? A B

[32] It is my view that firstly, Ernst & Young are "experts"; they are styled as such in the consent order.

[33] As experts, it is improbable that they are untutored in the ways of computing a fair valuation. It stands to reason that as experts they ought to be mindful that the 2008 accounts were only draft accounts and not audited accounts. C

[34] As experts, Ernst & Young need no reminders or caution by the appellants on the said draft accounts. Thus for the 3rd to 5th respondents to complain about the appellant's lack of initiative in alerting them about the 2008 unaudited accounts stands on thin ice and is therefore untenable. D

[35] As experts, Ernst & Young are aware or should be aware that unaudited accounts are unverified and therefore a true and fair view of the state of affairs of the company have not been drawn up. E

[36] It is the 2nd respondents case that the 2008 accounts had been audited by Folin Food's external auditors, Tai Yapp & Company. But the fact remains that the accounts are draft accounts only F

[37] It is also the 2nd respondent's case that the 2008 accounts had no material bearing on Ernst & Young's valuation of Folin Food, since the sole substantial asset of Folin Food is the Jalan 223 Petaling Jaya property. The 2nd respondent took the position that it is the value of the said property that effectively determines the value of Folin Food, not its accounts. The 2nd respondents argued that in any case, the dispute on the 2008 account centered principally only on the RM525,0000 that was included as expenses of Folin Food, which is less than 10% of the Jalan 223 property if that was taken at RM5.9 million as per the valuation of First Pacific Valuers. G H I

[38] Even the learned trial judge put no premium at all on the 2008 account in that it makes no difference that the amount of RM525,000 was included as expenses of Folin Food.

[39] Herein also lies a conundrum. The said property was taken at RM5.9 million (as valued by First Pacific Valuers) when valued by Ernst & Young. However, it was substantially reduced in value by Ernst & Young itself just months later, to the amount of RM2.9 million!

[40] Ernst & Young's case is that they were given a "free hand" to value Folin Food without any restrictions, whether as to the 2008 accounts or otherwise.

[41] The question is: can the expert (Ernst & Young) be given latitude in the valuation of the company shares as against the clear terms of the contract or consent order, as the case may be?

[42] Notwithstanding the legal position, it is apparent that Ernst & Young as the expert, had set about valuing Folin Food, unimpeded and uninhibited by legal or moral constraints.

[43] Ernst & Young took on a wide construction of the terms of the consent order; in their view, the terms entitled them to firstly make a decision without the need to refer to the parties in the consent order.

[44] Secondly, Ernst & Young felt justified in dealing exclusively with Wong Sin Fan on the premise that Wong is the director of Folin Food and that the appellants had also required DW2 (who is from Ernst & Young) to deal with Wong, bearing in mind that Wong is the man in charge of the daily management of Folin Food and that most of the documents are with him.

[45] Thereafter Ernst & Young relied mainly on Wong's recommendation and relied on the valuation of First Pacific Valuers to come to its own valuation of Folin Food. The appellant's challenge is that Ernst & Young had acted negligently and that there was no fair valuation of the said shares of the Folin Food.

[46] Firstly, it is well to remind ourselves of the observation of Sir John Romilly M.R. in *Collier v. Mason* [1858] 25 Beav 200, that:

> … this court must act on the valuation unless there be proof of some mistake or improper motive …

[47] In other words, where a contract (or in this case consent order) provides for a matter to be decided by an expert, the decision is binding on the parties because that is what they themselves have determined should be the position. However, it is my view this is so only if the expert's decision is a decision which has been made in accordance with the terms of the contract (or consent order as the case may be) and that the decision **will not** bind the parties if the expert, in coming to that decision, had departed from the explicit terms of the instruction to a material extent. (emphasis added).

[48] Tuan Haji Abdullah, learned counsel for the 3rd, 4th and 5th respondents was resolute in his view upon my query, that the parties are bound by the expert's decision, **even if grounded on a wrong basis.** (emphasis added). With respect I disagree. In my view an expert's decision can be subject to challenge for fraud, collusion, partiality, lack of independence etc.

[49] Although I would agree that the parties are still bound by the valuation even if the expert had made a mistake, this is so only if that valuation was made honestly and in good faith (See *Campbell v. Edwards* [1976] 1 WLR 403).

[50] However, Lord Denning in the above case observed that, if there was "... fraud or collusion of course, it would be very different."

[51] Then a different consideration applies.

[52] So the question is: is there in the instant appeal, any of the elements as envisaged above, which would vitiate the expert's valuation?

[53] Firstly, in the present appeal, the valuation had not been made in accordance with the express terms of the consent order.

[54] The consent order clearly stipulates that the valuation is to be done by Ernst & Young.

[55] Ernst & Young had "delegated" their authority and allowed Wong to handle the entire valuation process instead when Wong had appointed First Pacific Valuers even before Ernst & Young came into the picture. Ernst & Young did not seem perturbed by the fact that they had effectively abdicated their obligation as an expert.

[56] As events later unfolded, Wong's appointment of First Pacific Valuers was solely for his own interest since he wanted to purchase the 223 property.

[57] Thus, any pretence at transparency is now dispelled.

[58] The departure from the terms of the consent order was further affirmed when Ernst & Young relied solely on the valuation made by First Pacific Valuers. Ernst & Young did not make the valuation of Folin Food themselves.

[59] However, bearing in mind that Wong Sin Fan is an interested party to the whole transaction, it should be apparent that the decision of the Board of Directors of Folin Food is particularly crucial in both the appointment of First Pacific Valuers as well as the acceptance of First Pacific Valuer's Report by Wong.

[60] Wong Sin Fan (together with the 4th and 5th respondents) are obviously interested parties to the valuation process, since they are the potential, if not the "incumbent" purchasers of the Folin Food shares. A low price for the Folin Food shares (as valued by Ernst & Young) would work to Wong's and his cohorts' advantage.

[61] It is in evidence that the valuation done by First Pacific Valuers of RM5.9 million does not reflect the fair value of the property, bearing in mind that:

(a) Unsolicited offers made by third parties ie, Iprop dated 7 September 2009 for RM12 million and by Applied Construction and Engineering (M) Sdn. Bhd. dated 29 August 2008 for RM10.8 million;

(b) the 3rd, 4th and 5th respondent's own offer by RM7,136,680 for Folin Food shares, inclusive of the property;

(c) Wong Sin Fan's, assessment of the value of property being in excess of RM15 million, as represented to the Companies Commission Malaysia (CCM) in Wong's letter of 29 August 2008; and

(d) The valuation conducted by Khong & Jaafar which valued the property at RM10.5 million.

[62] After all the above said valuations, Ernst & Young's valuation at RM2.9 million is certainly Lilliputian by any standards. Yet it was accepted by Wong!! Therefore for Ernst & Young to give Wong a free hand in picking out a property valuer (First Pacific Valuers) and to then pay the valuers' fees himself (and not from the offers of Folin Food) clearly smacked of collusion and lack of independence and impartiality – the very elements described by Lord Denning as a situation which would "unravel everything" (per Lord Denning in *Campbell v. Edwards supra*).

[63] Thus as cases such as *Campbell v. Edwards* and *Baber v. Kenwood Manufacturing Co. Ltd. v. Whinney Murray & Co.* [1978] 1 Lloyds Rep. 175 had determined, if the valuation had not been made in accordance with the express terms of the contract (or in this appeal, the consent order) then it is clearly not binding.

[64] In the present appeal, Ernst & Young had clearly departed in a material respect from the terms of the consent order, which renders the valuation as not binding on the contracting parties.

[65] As *Jones v. Sherwood* [1992] 1 WLR 277, had held, the decision of an expert is not binding on the parties if the expert had departed from the instructions in a material respect.

[66] In my view, the departure by Ernst & Young was clearly departure in a material respect. The test of materiality is as follows:

> … once a material departure from instructions is established, the court is not concerned with its effect on the result … the determination in those circumstances is simply not binding on the parties. Given that a material departure vitiates the determination whether or not it affects the result, it could hardly had the effect on the result which determines the materiality of the departure in the first place. Rather I would hold any departure to be material unless it can truly be characterised as trivial or *de minimis* in the sense of it being obvious that it could make no possible difference to either party.

(Per Simon LJ in *Jones v. Sherwood, supra*)

[67] As it is clear, Folin Food has an income from the rental collection at the material time. But its one and only asset is the Jalan 223 property in Petaling Jaya. It is thus the value of the property which in actual terms, determines the value of the shares of Folin Food. Clearly, if there was no proper determination of the value of the said property, whether in its actual valuation or in the

process thereof, the valuation of the Folin Food shares would then be questionable. If it is apparent (and I say it is) that the valuation by First Pacific Valuers is partial and therefore not independent, and does not reflect the fair value of the property, it can only mean that the valuation of Ernst & Young (of Folin Food shares) should therefore fail to manifest a fair value of the shares. The orders we handed down therefore reflects the position we have taken in this appeal.

Ramly Ali Ali JCA:

[68] The appeal herein lies against the decision of the learned High Court Judge, after a full trial, wherein the appellants (the plaintiffs at the court below) claim was dismissed with costs. The learned judge in turn allowed the 3rd, 4th and 5th respondents' (the defendants at the court below), counterclaim and ordered specific performance against the appellants for the performance of a consent order recorded by the parties on 4 June 2009 (consent order). As for the issue of costs, the 2nd and 3rd appellants were ordered to pay costs of RM25,000 to the 2nd respondent and a further sum of RM25,000 to the 3rd, 4th and 5th respondents *in lieu* of taxation.

[69] The subject matter of this appeal revolves around the shares of a company known as Folin Food Processing Sdn Bhd (Folin Food), a consent order that was recorded on 4 June 2009 and the valuation report prepared by the 2nd respondent (Ernst and Young) by virtue of the said consent order.

Shareholders Of Folin Food

[70] Folin Food has a paid up capital of 1,000,005 shares of which 1,000,000 shares are held by Folin & Brothers Sdn Bhd (in liquidation) (Folin Brothers) which is the 1st appellant herein. The remaining five shares are held by:

(a) the liquidators of Folin Brothers (liquidators), who are the 2nd and 3rd Appellants and who each holds 1 share; and

(b) the 3rd, 4th and 5th respondents together with Wong Boon Sun and the Estate of Wong Foh Ling who also each holds one (1) share. Incidentally the 3rd, 4th and 5th respondents together own 75% of the shares in Folin Brothers (in liquidation).

[71] The board of directors of Folin Food is and was at all material times made up of three (3) members, namely the two (2) liquidators and the 3rd respondent (Wong Sin Fan).

Shareholder Of Folin Brothers (In Liquidation)

[72] Folin Brothers (in liquidation) is a family company. It has a paid up capital of 1,000,002 shares of which the 3rd, 4th and 5th respondents each holds (25%), the Estate of Wong Foh Ling holds (0.083%) and Wong Boon Sun (a bankrupt) holds (24.17%). The 2nd and 3rd appellants were appointed as liquidators of Folin Brothers on 13 March 1997. Folin Brothers currently derives its income from dividends declared and paid to it by virtue of its shareholding in Folin Food.

[73] A dispute arose between the 3rd, 4th and 5th respondents, on the one hand, and the liquidators, on the other hand, as to the management of the affairs of Folin Food resulting in the 3rd, 4th, and 5th respondents launching a s. 181 Petition alleging oppression as minority shareholders of Folin Food (181 Petition). The respondents to the 181 Petition were Folin Food and the liquidators.

[74] In the meantime an offer was made by the 3rd, 4th and 5th respondents to purchase the shares held by Folin Brothers in Folin Food for a price of RM7,136,680. The liquidators of Folin Brothers did not agree to the said offer.

[75] Before the 181 Petition was disposed off, the parties to the said petition entered into a consent order which was recorded before Justice Mary Lim. The salient terms of the consent order read as follows:

(1) Ernst & Young to be appointed as expert to value the shares of the 1st Respondent with unfettered and unrestricted access to the books of the 1st Respondent which the exercise is to be completed within 90 days from 4th day of June 2009;

(2) upon ascertainment of a fair price of the shares of the 1st Respondent, a sale and purchase agreement (Sale and Purchase Agreement) is to be entered into between the relevant parties within 30 days;

(3) the Sale and Purchase Agreement to provide that 10% of the purchase price is to be paid upon signing and the balance is to be paid within 3 months with the right of extension of 30 days subject to interest payment at Maybank rate in respect of that extension;

(4) the petition be withdrawn with no order as to costs and with no liberty to file afresh; and

(5) the Petitioners to withdraw the notice of appeal filed on 2nd day of June, 2009 with no order as to costs.

[76] After the consent order was entered into, the 2nd respondent (Ernst and Young) contacted the 2nd appellant to obtain the records of Folin Food to commence work on the valuation. The 2nd appellant informed Ernst and Young to contact the 3rd respondent (Wong Sin Fan) as he had all the records of Folin Food.

[77] Ernst and Young prepared their proposal setting out their terms of reference which was given to Wong Sin Fan on 16 July 2009 and accepted by him purportedly on behalf of Folin Food on the same day. It is an undisputed fact that Ernst and Young did not consult any of the other directors of Folin Food and that Wong Sin Fan did not obtain any authorization from the other directors of Folin Food to sign the Ernst and Young proposal.

[78] The only asset for valuation in Folin Food is a property known as Lot No. 316, Section 14, Petaling Jaya and that a substantial portion of the valuation of its shares relies on the valuation of the said property.

[79] Wong Sin Fan then appointed First Pacific Valuers Property Consultants Sdn Bhd (First Pacific) to conduct the valuation of the property. Wong Sin Fan did not obtain the approval of the board of directors of Folin Food to appoint First Pacific Valuers and the fee for such valuation was not paid by Folin Food. Wong Sin Fan had approached First Pacific to conduct the valuation of the property on 8 April 2009 even before the consent order was entered into.

[80] First Pacific valuers carried out the valuation and Ernst and Young prepared their report and submitted a draft to Wong Sin Fan and Wong Sin Fan accepted the report. Again, Wong Sin Fan

did not consult any of the other directors of Folin Food and did not obtain any authority from Folin Food to approve the draft report.

[81] Ernst and Young then issued their report to all the parties on 25 September 2009 purporting to value the shares of Folin Food at RM2.9 million. Upon receipt of the report, the liquidators immediately wrote to Ernst and Young objecting to the fact that they were never consulted and that the audited accounts relied on by Ernst and Young were disputed. The liquidators requested for information and documents. Ernst and Young refused to provide any information or documents and requested that the liquidators apply to court for the same.

[82] Based on Ernst and Young's report the 3rd, 4th and 5th respondents forwarded to the liquidators a Sales and Purchase Agreement for the purchase of the shares at the price determined in the report.

[83] The liquidators (appellant's) being dissatisfied with the report, commenced the present action in the High Court seeking to set-aside the report. The appellants alleged that the 2nd respondent (Ernst and Young) had been negligent in preparing the report and sought damages against them, whilst the 3rd, 4th and 5th respondents counterclaimed in the High Court action seeking specific performance of the Sale and Purchase Agreement as stipulated in the consent order. After a trial, the learned High Court Judge dismissed the liquidators' claim against all the respondents and allowed the 3rd, 4th and 5th respondents' counterclaim and ordered specific performance against the appellants in terms of the consent order.

The Appellants' Contentions

[84] The appellants were not challenging the consent order dated 4 June 2009. In fact the appellants were seeking to implement the consent order by asking the shares of Folin Food to be valued at fair value. To the appellants the mandate given to Ernst and Young is as contained in the consent order and this mandate requires Ernst and Young to provide a fair valuation of the shares. By failing to provide a fair valuation, the appellants alleged that Ernst and Young have acted contrary to the mandate provided to them.

[85] The appellants contended that as the valuation report by Ernst and Young relied substantially on the First Pacific Report, it is important to determine if that report is really independent and reflects the fair value of the property, particularly when First Pacific was appointed solely by Wong Sin Fan (the 3rd respondent, who is also one of the purchasers-to-be of the said shares) without authority of the company, Folin Food. It is not in dispute that Wong Sin Fan was the only person who liaised with First Pacific and who paid for the said report from his own source, but not Folin Food.

[86] The appellants submitted that valuation of the property done by First Pacific of RM5.9 million does not reflect the fair value of the property. This is evidenced by the following:

(a) unsolicited offers made by third parties, namely, iProp dated 7 September 2009 for RM12 million, and by Applied Construction and Engineering (M) Sdn Bhd dated 29 August 2008 for RM10.8 million;

(b) the 3rd, 4th and 5th respondents' own offer of RM7,136,680 for the Folin Food shares, inclusive of the property;

(c) Wong Sin Fan's assessment of the value of the property being in excess of RM15 million as represented to the Companies Commission of Malaysia (CCM) in his letter dated 29 August 2008; and

(d) the valuation conducted by Khong & Jaafar which valued the property at RM10.5 million.

The 3rd, 4th And 5th Respondents' Contentions

[87] The appellants (the liquidators) have not in any way raised the issue of fraud. Their only complaint is that the value in the report was allegedly not a fair value because Ernst and Young (the 2nd respondent) allegedly did not consult them (the liquidators) and had taken into account the disputed 2008 accounts of Folin Food.

[88] DW2, on behalf of the 2nd respondent, contacted the 2nd appellant to seek information about Folin Food only to be told that neither he nor the 3rd appellant was in possession of Folin Food's documents and information and the 2nd appellant had then himself directed DW2 to contact the 3rd respondent. This is

exactly what DW2 proceeded to do. In fact the 2nd appellant himself confirmed that the 3rd respondent was in charge of the day to day management of Folin Food.

[89] On the issue of the reliance by the 2nd respondent on the so called disputed 2008 accounts it is pertinent to note that Folin Food is a dormant company whose only income is from the collection of rental. Accordingly, the accounts of the company are not material in the preparation of the report. The liquidators had already disputed the said 2008 accounts at the time the consent order was recorded. It is also important to note that the liquidators called an EGM of Folin Food to discuss the disputed items of the 2008 accounts, the 2nd appellant in his capacity as chairman of the meeting adjourned the meeting leaving various outstanding issues hanging. The 2nd respondent had a 90-day time frame to prepare the report and the liquidators could have drawn the 2nd respondent's attention to the disputed items of the 2008 accounts.

[90] The 2nd respondent as an expert was entitled to adopt a proper method in the determination of the value and was not obliged to make a decision on the basis of the evidence presented by the parties. As an expert valuer, the 2nd respondent had decided to accept the valuation prepared by First Pacific, and such decision, in the absence of manifest error, is not open to challenge.

[91] The liquidators tried to make an issue of the fact that the First Pacific valuation was purportedly commissioned by the 3rd respondent and not Folin Food. The appellants have not shown, and no evidence has been led to show, how the fact that just because the 3rd respondent allegedly appointed First Pacific, this had in any way influenced First Pacific in its valuation of the subject property.

[92] According to the 3rd, 4th and 5th respondents, the learned judge correctly held that the suggestion that the appointment of First Pacific by the 3rd respondent was with merit having regard to the fact that he was at all material times a director of Folin Food and therefore had the necessary authority to act on behalf of Folin Food.

[93] The 3rd, 4th and 5th respondents further contended that the liquidators are clearly acting contrary to their duties and obligations. The liquidators were acting out of self interest rather than in the discharge of their duties. The liquidators are effectively asking the court to entirely alter the consent order. The court has no jurisdiction to do such a thing. Rectification is only available where there has been fraud or mutual mistake. That's not the case here.

The 2nd Respondent's Contentions

[94] Folin Food is essentially a dormant company whose only income is from the collection of rental. The day to day management and the documents of Folin Food are in the control of Wong Sin Fan (the 3rd respondent). The 2nd respondent is an outsider who dealt with the 3rd respondent who was a director of Folin Food and was in the day to day management of the company. The 2nd respondent was entitled to infer that the 3rd respondent as a director, had authority to act on behalf of Folin Food. There is no evidence to show that DW1 who was acting for the 2nd respondent was put on inquiry of any irregularity.

[95] The 2nd respondent's reliance on the 2008 accounts was entirely proper. The 2008 accounts had been audited by the company's auditors, Tai Yapp & Co.

[96] The appellants have in the circumstances not proven their claim that the 2nd respondent conducted the valuation of Folin Food shares negligently. There is no evidence led by the appellants that any other reasonably skilled accountant would have conducted the valuation of Folin Food differently from the 2nd respondent.

Findings By The High Court Judge

[97] In dismissing the appellant's claims and allowing the respondents 3rd, 4th and 5th counterclaim, the learned High Court Judge made the following findings:

(a) by the terms of the 1st paragraph of the consent order, the 2nd respondent was granted unrestricted and unfettered access to the books of Folin Food; this entitles the expert to adopt an approach without the need to refer to the parties before making any decision on the valuation;

(b) the 2nd respondent was justified in dealing with Wong Sin Fan to the exclusion of the liquidators (the appellants) because Wong Sin Fan is a director of Folin Food and it was the 1st appellant on behalf of the liquidators who had required DW2 to deal with Wong Sin Fan who was in charge of the day to day management of Folin Food and the documents of Folin Food were is his control;

(c) after directing DW2 to deal with Wong Sin Fan, the 1st appellant never contacted DW2 thereafter. The irresistible inference from this conduct of the 1st appellant is that he was perfectly happy to leave the implementation of the consent order in the hand of Wong Sin Fan in his capacity as the active director of Folin Food. Accordingly the 2nd respondent did not depart from the terms of the consent order;

(d) as to the issue that the 2nd respondent erroneously relied on the 2008 draft audited accounts without regard to the disputed items, Folin Food was essentially a dormant company whose only income is from the collection of rental. For this reason the learned judge ruled that the accounts of the company are not material;

(e) there is no merit on the appellant's complaint that the appointment of First Pacific was without the knowledge or approval of the liquidators (the appellants) and not supported by a resolution of Folin Food because the 3rd respondent (Wong Sin Fan) was at the material times the director of Folin Food and consequently entitled to nominate First Pacific, as the property valuer;

(f) the consent order was designed to resolve the outstanding issues affecting Folin Food and Folin Brothers. The liquidators are challenging the consent order more out of self interest than in the discharge of their duties as liquidators of Folin Brothers and directors of Folin Food. The consent order that they are seeking to depart from in this action, to defend their entitlement to remain as liquidators when some of the respondents in this action sought to remove them as liquidators of Folin Brothers in Companies Winding Up Petition No. 28-66-1980.

A **Findings Of This Court**

[98] The determination of the issue in the present appeal revolves on the interpretation and the true meaning of the consent order dated 4 June 2009. The appellants are not questioning the validity
B of the said consent order. The dispute in the present appeal is whether the determination of the fair value of Folin Food shares was done in accordance or in conformity with the terms of the consent order. Parties are bound by the terms of the consent order. Both parties have their legitimate expectation that the terms
C of the consent order be complied with in its true sense.

[99] Reading paras. 1 and 2 of the said consent order, it is clear that Ernst and Young (the 2nd respondent) was to value the shares of Folin Food and to ascertain fair price of the shares. The valuation process must be done independently and in a fair
D manner, particularly so, when the parties involved in the consent order were not in good terms with conflicting interest between them.

[100] The value of shares of a company would obviously include
E the value of its assets and properties (if any), after taking into consideration the liabilities (if any). In determining the value of the assets or properties of Folin Food, Ernst and Young may appoint an independent qualified property valuer to do the job. The consent order stipulates that the appointment, if necessary, must
F be done by Ernst and Young in a transparent and professional manner. Where the parties to the consent order are not in good term with conflicting interest, to allow only one of them to select and appoint the property valuer (in this case is First Pacific) without any consultation with the other party is clearly not a fair
G move to do. Ernst and Young, as a professional valuer must show that it is an independent body in carrying out its jobs as envisaged by the consent order, not only in the result of the valuation, but also throughout the whole process of the valuation.

H **[101]** In this case, the process of appointing First Pacific as the property valuer was not done in a fair manner as envisaged by the consent order. It was solely done by Wong Sin Fan (the 3rd respondent) who was an interested party to the whole transaction. He may be an active director of Folin Food at the material time,
I but being an interested party, the decision of the board of directors of Folin Food in the circumstances is required particularly

in matters relating to appointment of First Pacific as the property valuer as well as acceptance of the report prepared on the valuation. In this case, the evidence clearly show that all were done solely by Wong Sin Fan, without any consultation, consent or authority from the board of directors of Folin Food.

[102] It is not in dispute that immediately after the consent order was entered into, DW2, on behalf of Ernst and Young did contact the 2nd appellant to ask for all the relevant documents of Folin Food for the purpose of the job; and he was told neither the 2nd appellant nor the 3rd appellant was in possession of those documents and information, and the 2nd appellant had then himself directed DW2 to contact the 3rd respondent, as he was in charge of the day to day management of Folin Food. However, in the circumstances of the case the court in of the view that a request to obtain documentation and information from Wong Sin Fan cannot surely be translated into authorization to Wong Sin Fan to act on behalf of Folin Food on all matters without any consultation with the board of directors of the company. Authorization to provide documents and information relating to Folin Food to Ernst and Young is already stipulated in para. 1 of the consent order where Ernst and Young was given "unfettered and unrestricted access to the books of the 1st respondent". That authorization is not in any way to be extended to give mandate to Wong Sin Fan to appoint First Pacific as the property valuer and to accept their valuation report on the property in question. In that sense, Wong Sin Fan had in fact exceeded the authority given to him, when he solely appointed First Pacific as the property valuer and later when he accepted the valuation report on the property. Therefore, the valuation report on the said property prepared by First Pacific should not be relied upon by Ernst and Young for the purpose of shares valuation of Folin Food.

[103] Wong Sin Fan (together with the 4th and 5th respondents) are clearly interested parties to the valuation process. They are the 'purchasers-to-be' of Folin Food shares held by Folin Brothers (in liquidation) and the appellants. The lower the price of Folin Food shares as valued by Ernst and Young and First Pacific the more beneficial to them as the purchasers of the said shares. Therefore, to allow Wong Sin Fan to solely appoint First Pacific to value the property in question (which was the only available asset of Folin Food) and to pay the valuer's fees from his own source (not from Folin Food) is clearly unwarranted. It is

A also important to note that Wong Sin Fan had approached First Pacific to conduct the valuation of the property on 8 April 2009, even before the consent order was entered into.

[104] The valuation done by First Pacific of RM5.9 million does
B not reflect the fair value of the property. This is evidenced by the following:

(a) unsolicited offers made by third parties (iProp; and Applied Construction and Engineering (M) Sdn Bhd) in respect of the same property for RM12 million and RM10.8 million;
C

(b) the 3rd, 4th and 5th respondents' own offer of RM7,136,680 for Folin Food shares, inclusive of the said property;

(c) Wong Sin Fan's assessment of the value of the property being
D in excess of RM15 million as represented to the Companies Commission of Malaysia (CCM) in a letter dated 29 August 2008; and

(d) the valuation conducted by Khong & Jaafar valued the property at RM10.5 million.
E

The above valuation may not be conclusive by themselves. However, they are good indicator as to what is the fair value of the said property at the material times. The valuation of RM5.9 million on the said property by First Pacific is too low in the
F circumstances of the case.

[105] Folin Food has an income from the collection of rental at the material times. However, the sole substantial asset of Folin Food in the said property, which is situated at Jalan 223, Petaling
G Jaya. It is therefore the value of the property that effectively determines the value of Folin Food shares. If the value of the property is not properly determined, be it in the actual valuation or the process of valuation, then the valuation of Folin Food shares would not be reliable. If the valuation by First Pacific is not
H independent and does not reflect the fair value of the property, it follows that the Ernst and Young valuation of the shares of Folin Food consequently fails to reflect a fair value of the shares.

[106] The management report relied on by Ernst and Young
I constitute draft accounts prepared at the behest of Wong Sin Fan which have been queried, challenged and disputed by the appellants when the same was tabled for discussion at the EGM of Folin Food held on 14 August 2009. The draft 2008 accounts

were in dispute as they contained liabilities that were included by the auditors even though they constituted expenses which were not authorized or under dispute. Ernst and Young had failed to take into account a sum of RM535,000 being the difference in the net assets of Folin Food. Such failure renders the valuation prepared not of fair value. The amount is in fact significant as it amounts to 1/6 of the value of total valuation.

[107] The learned judge in his judgment held that the accounts of the company are not material in determining the fair value of its shares. With respect, this court cannot agree with him on this point. It is common knowledge that fair value of shares of a particular company (incorporated under the Companies Act 1965) relies on the net value of assets and total liabilities of the company. The value of the shares would be higher if the net value of its assets exceeds the total liabilities. On the contrary, the value of the shares would be lower if the total liabilities exceed the net value of its assets. The only statutory document which one can rely on for this purpose is the yearly audited accounts of the company which must be tabled and passed by the company during general meeting and later be submitted for filing at the Companies Commission of Malaysia (CCM) for public consumption. Therefore, in this case, the 2008 audited accounts of Folin Food are still necessary for the purpose of determining the fair value of its share. The fact that Folin Food is dormant (not carrying any business activity) is immaterial because there are cases where a dormant company may incur liabilities in the form of borrowing for investment or for some other non-business financial commitment. This is particularly so where an amount of RM535,000 in the draft 2008 account had been disputed and the draft account had not been passed by the company at its general meeting.

[108] First Pacific, as valuer of the property, valued the property at RM5.9 million, while Ernst and Young, as valuer of the shares valued the shares at RM2.9 million. The difference in both valuations is very significant. Why and how did it happen? There is no logical explanation given in the report or evidence adduced in court to explain the difference. Usually, in practice, the value of the shares would be lower than the value of the property if the company has substantial liabilities. In the present case, there is no indication to show that Folin Food has substantial liabilities, except for the RM535,000 which is still being disputed. That amount of liabilities will not in any way be able to reduce the value of RM5.9 million to RM2.9 million, as determined by Ernst

and Young. The 2008 accounts were held to be immaterial by the learned judge. Therefore we have no bearing as to what actually happened when the value of RM5.9 million (the value of the property) was drastically reduced to RM2.9 million (the value of the shares).

[109] At para. 3.3 of his written submissions, the learned counsel for Ernst and Young submitted that "the 2008 accounts in any case had no material bearing on EY's valuation of Folin Food. The sole substantial asset of Folin Food, a dormant company, is the Jalan 223 property. It is therefore the value of the property the effectively determines the value of Folin Food, not its account." With respect we find this line of submission is puzzling. If the value of the property (ie, RM5.9 million) effectively determines the value of Folin Food shares and the company being a dormant company with disputed liabilities of RM535,000 then how could the value of the shares of the company be reduced drastically to RM2.9 million? There is no logical explanation given either by Ernst and Young or by Wong Sin Fan (the 3rd respondent) on the issue.

[110] The action filed herein by the appellants seeks to challenge the valuation by Ernst and Young on the basis of partiality, lack of independence, unfairness and failure to adhere to the terms of the consent order. The appellants are not challenging the consent order itself. These are all valid grounds in law for challenging an expert valuation. The court has the jurisdiction to act in the interest of justice to enforce the true intention of the consent order.

[111] The appellants were not challenging the consent order "more out of self-interest than in the discharge of their duties" as found by the learned judge. With respect, we are of the view that the learned judge failed to recognize that as liquidators, the appellants have a duty to collect all assets of the company in liquidation and to act in the interest of all the creditors and contributories of Folin Brothers (in liquidation) which own 1,000,000 out of 1,000,007 shares in Folin Food. Besides the 3rd, 4th and 5th respondents, there were two others shareholders of Folin Brothers whose interest must be safeguarded by the appellants as liquidators of Folin Brothers. They are Wong Boon Sun who holds 24.17% of the shares in Folin Brothers; and the Estate of Wong Foh Ling who holds 0.083% of the shares in Folin Brothers. These duties of the Liquidators are specified in

ss. 236 and 237 of the Companies Act 1965. The appellants as liquidators of Folin Brothers cannot justify selling the property and the shares in Folin Food (owned by Folin Brothers) at an undervalue just because it is in the interests of the 3rd, 4th and 5th respondents to do so. Therefore, the learned judge's conclusion that the appellants were "challenging the consent order more out of self-interest than the discharge of their duties" is obviously on an erroneous basis.

[112] The court is satisfied that the First Pacific valuation of the property in question is not independent and does not reflect the fair value of the property. As the valuation of the shares by Ernst and Young relied heavily on this valuation it follows that the Ernst and Young valuation of the shares consequently fails to reflect a fair value of Folin Food shares.

[113] Taking into account the conduct of Ernst and Young in allowing Wong Sin Fan (the 3rd respondent) to run the valuation exercise, Ernst and Young cannot be expected to produce a fair valuation of Folin Food shares. The property which is the sole asset of Folin Food ought to be valued by another valuer appointed by Ernst and Young and the shares of the company be revalued by Ernst and Young thereafter in accordance with the terms of the said consent order.

Ernst And Young's Negligence

[114] The appellants claimed that Ernst and Young have been negligent in carrying out their duties as independent valuers of Folin Food shares and therefore liable to pay damages to the appellants.

[115] The court is of the view that the facts pleaded and relied on by the appellants as the basis of their claim against Ernst and Young do not establish negligence on part of Ernst and Young on the appellants. The appellants do not take issue with the methodology adopted by Ernst and Young in valuing Folin Food shares. The appellant's complaint ultimately is on the value of the property, as valued by DW1. There is however no allegation that DW1 was negligent in valuing the said property.

[116] There may be weaknesses on the part of Ernst and Young in relying on the valuation of the property by First Pacific and an audited management report to the accounts of Folin Food for the financial year ended 31 December 2008 without taking into

account the fact that the audited management report was challenged, but such weaknesses alone are insufficient to constitute actionable negligence in law on the part of Ernst and Young. Ernst and Young (through DW2) was relying on Wong Sin Fan (the 3rd respondent) who was an active director of Folin Food involved in the day to day management and the documents of the company. In fact DW2 was asked by PW1 to contact Wong Sin Fan to get all the necessary documents relating to the company.

[117] In the premises the court finds that on the balance of probabilities the appellants have failed to establish their claim for negligence against the 2nd respondent (Ernst and Young). Therefore, their claim against the 2nd respondent fails.

Conclusion

[118] In our view, parties are bound by the terms of the consent order dated 4 June 2009. Reading paras. 1 and 2 of the said consent order, it is clear that Ernst and Young was to value the shares of the 1st respondent (Folin Food) and to ascertain a fair price of the shares. The appellants had adduced sufficient evidence to show in effect that there is manifest error in the valuation of the property as well as the shares in question, resulting in the price not being a fair price as intended by the consent order.

[119] We therefore allow the appeal with costs, except the decision of the learned High Court Judge with regard to the claim by the appellants against the 2nd respondent (Ernst and Young) for negligence. That part of the judgment is upheld.

[120] We therefore make the following consequential orders:

(i) that the land which is the sole asset of the 1st respondent (Folin Food) be revalued by another valuer appointed independently by Ernst and Young and the shares of the 1st respondent (Folin Food) be revalued by Ernst and Young thereafter, to ascertain their fair price in accordance with the terms of the said consent order;

(ii) costs of RM15,000 to be paid by the respondents to the appellants; and

(iii) deposit to be refunded to the appellants.